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No. 93-14

In the Supreme Court of the United States

OCTOBER TERM, 1993

ELUID GONZALES GUERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the enhancement of petitioner's sentence for his aggravating role in the offense, under Sentencing Guidelines § 3B1.1(a), violated the Ex Post Facto Clause.

2. Whether the court of appeals used the correct standard of review in determining whether petitioner was entitled to a reduction in his offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1

3. Whether the district court violated the Fifth Amendment privilege against compelled self-incrimination in denying petitioner a reduction in his offense level for acceptance of responsibility under Sentencing Guidelines § 3E1.1.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A3-A22, is unpublished, but the judgment is noted at 990 F.2d 627 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1993. The petition for a writ of certiorari was filed on June 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a plea of guilty in the United States District Court for the Southern District of Texas to filing false income tax returns, in violation of 26 U.S.C. 7206(1) (Counts 10 and 11); re-entering the United States as a deported alien, in violation of 8 U.S.C. 1326 (Count 12); conspiring to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846 (Count 1); distributing marijuana, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 4); and using a communications facility in the commission of a felony, in violation of 21 U.S.C. 843(b) (Counts 7 and 8). Presentence Report (PSI) 1. He was sentenced to 384 months' imprisonment, to be followed by a three-year period of supervised release. 4/24/92 Tr. 23. The court of appeals affirmed.

1. Between 1984 and 1987, petitioner, his brother Efrain Gonzales Guerra, his sister-in-law Elma Flores Guerra, and other persons operated a marijuana enterprise that distributed more than 1,000 kilograms of marijuana within the Southern District of Texas. Pet. App. A4-A5. The ring's primary supplier was Ernesto Garza-Saenz, a Mexican national and the head of a drug-smuggling family in Mexico. PSI 11-12.

During the execution of a search warrant at the residence of petitioner's brother and sister-in-law, federal agents seized two pounds of marijuana and six narcotics notebooks. The notebooks contained detailed records of the ring's marijuana transactions. The records established that between 1984 and 1987, petitioner and his co-conspirators distributed quantities of marijuana valued at more than $2 million. Of that amount, approximately $1 million was directly attributable to petitioner. On May 5, 1989, petitioner filed his income tax returns for the years 1985 and 1986. On those returns, he did not re-

port any income from his drug transactions. Pet. App. A4-A5; Gov't C.A. Br. 5-6; PSI 3.

2. Because the drug conspiracy and the illegal use of a communications facility occurred before November 1, 1987, petitioner received non-Guidelines sentences for those offenses.[1] He was sentenced under the Sentencing Guidelines on his convictions for filing false income tax returns and for re-entering the United States as a deported alien.

The PSI recommended that petitioner receive a four-level enhancement in his offense level pursuant to Sentencing Guidelines § 3B1.1(a), based on evidence that petitioner was the leader of the marijuana distribution network. PSI 16. The PSI recommended against awarding petitioner a two-level reduction for acceptance of responsibility pursuant to Sentencing Guidelines § 3E1.1, on the ground that petitioner "has not clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct." PSI 17. The PSI explained, PSI 14-15:

> During [petitioner's] interview for this case he did not accept responsibility for his criminal conduct. He was evasive and did not want to provide any information regarding his culpability. He stated that he could not add any details to those already

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[1] In particular, petitioner was sentenced to 180 months' imprisonment on the marijuana conspiracy count, 60 months' imprisonment on the two distribution counts, and 48 months' imprisonment on the two communications facility counts, for a total of 288 months' imprisonment on the pre-Guidelines convictions. 4/24/92 Tr. 22-23. He was sentenced to 72 months' imprisonment on the two tax evasion counts, and to 24 months' imprisonment for the illegal reentry count, for a total of 96 months' imprisonment on the Guidelines convictions. The Guidelines sentences are to run consecutively to the pre-Guidelines sentences, for a total sentence of 384 months' imprisonment.

> contained in the Government's report. He related that any attempt on his part to explain his version of the case would be useless since he had already pled guilty. In his opinion, any attempt to mitigate or clarify his role in the offense would be futile in view of the Government's vast resources already allocated to obtain his conviction. He constantly commented "if you want to know what I did, just look at the report, it's all there." Additionally, he maintained that his income was earned from legitimate sources such as the sale of tractor trailers and some farm equipment which he said he reported on his taxes. He also declared that he was not part of any marijuana conspiracy even though he did admit to his conviction for marijuana distribution in 1974. He adamantly denied being involved in the double homicide as alleged in some of the information found in the investigative material.[2]

Adopting the findings of the PSI, the district court imposed a four-level increase pursuant to Sentencing Guidelines § 3B1.1(a) based on the finding in the PSI that petitioner was a leader or organizer of the marijuana conspiracy. 4/24/92 Tr. 18. The court declined to award petitioner a two-level reduction in offense level for acceptance of responsibility pursuant to Sentencing Guidelines § 3E1.1. The court explained, 4/24/92 Tr. 19:

> The acceptance of responsibility, it's very clear to me from the P.S.I. that [petitioner] simply refused to talk about what he had done, and his references to the

[2] DEA agents interviewed Garza-Saenz while he was imprisoned in Mexico. Garza-Saenz confirmed previous intelligence that petitioner owed him $1.5 million from consigned drug sales. Garza-Saenz also told the agents that petitioner shot and killed Garza-Saenz's brother and a cousin while attempting to resolve the issue of the outstanding debt. Gov't C.A. Br. 6-7; PSI 12-13.

> records simply were his refusal to discuss with the probation officer his activities, which is part of coming up with the two point reduction for acceptance of responsibility. So I have no question in my mind he's not accepting responsibility as that term is used in the Guidelines.
>
> For those reasons I will adopt the Findings of Fact of the presentence report as my own Findings of Fact, and I also adopt the application of those facts to the Guidelines as found in the presentence report.

3. The court of appeals affirmed. Pet. App. A3-A22. It upheld the role-in-the-offense enhancement under Sentencing Guidelines § 3B1.1(a), rejecting petitioner's argument that an increase could not rest on his leadership role in the marijuana trafficking transactions. The court held that petitioner's base offense level was properly based on all relevant conduct, not merely on acts that were cited in the counts of conviction. The court found that petitioner's gross receipts from his drug transactions constituted the unreported income that was the basis for his tax offenses. Based on that determination, the court ruled that petitioner's role in the marijuana conspiracy constituted "relevant conduct" for his income tax offenses under Sentencing Guidelines § 1B1.3, and that the district court therefore properly considered that conduct in determining petitioner's sentence. Pet. App. A7-A10.

The court also rejected petitioner's claim that the district court erred in not granting him a reduction in his offense level pursuant to Sentencing Guidelines § 3E1.1 for acceptance of responsibility. The court noted that the district court's findings on the matter were entitled to greater deference on review than is conferred by the clearly erroneous standard, and that the district court's conclusion would stand unless it was "without founda-

tion." Pet. App. A13. Applying that standard, the court found that the district court had not erred in denying petitioner an acceptance-of-responsibility reduction. The court explained:

> The record shows that [petitioner] denied involvement in any marijuana conspiracy, denied participating in a double homicide which occurred in Mexico and claimed his income was earned from legitimate sources. [Petitioner] also denied he had a leadership role in the conspiracy. Furthermore, [petitioner] was evasive and refused to cooperate with probation officials following the entry of his guilty plea.

Pet. App. A14-A15 (footnote and citations omitted).[3]

ARGUMENT

1. Petitioner claims that the Ex Post Facto Clause prohibited the district court from increasing his offense level for being a leader or organizer of the marijuana conspiracy, under Sentencing Guidelines § 3B1.1(a), since the conspiracy terminated prior to the date the Sentencing Guidelines went into effect. Pet. 7-16. As an initial matter, petitioner did not raise that issue in either the district court or the court of appeals, and thus he may not raise it here for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[4] Moreover, the

[3] The court of appeals also rejected petitioner's claim that, in setting his offense level, the district court had improperly calculated the amount of gross income he had failed to report, as well as a challenge to the competency of petitioner's counsel. Pet. App. A16-A21.

[4] Furthermore, because petitioner did not lodge an ex post facto objection at sentencing to the district court's consideration of his leadership role in the marijuana conspiracy, he could not obtain relief unless the district court committed "plain error" under Fed.

issue is of diminishing importance, because there are few remaining instances in which the courts will have occasion to consider pre-Guidelines activities as relevant conduct for sentencing purposes, and because there will be even fewer such cases as time passes.

"The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981) (footnote omitted) (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1866)). To establish a violation of the Ex Post Facto Clause, this Court has made clear that "the law must be retrospective, that is, it must apply to events occurring before its enactment," and the law "must disadvantage the offender affected by it." *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver*, 450 U.S. at 29). "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" *Miller*, 482 U.S. at 430 (quoting *Weaver*, 450 U.S. at 31).

Petitioner pleaded guilty to a tax offense that he committed after the effective date of the Sentencing Guidelines. Because the actual crime for which petitioner was being sentenced occurred after the effective date of the Sentencing Guidelines, application of Sentencing Guidelines § 3B1.1(a) to that count did not violate the Ex Post Facto Clause.

R. Crim. P. 52(b). Petitioner could not satisfy the rigorous standard of Rule 52(b), however, because he could not show that the district court's ruling was clearly or obviously wrong, or that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)).

Nor was the Ex Post Facto Clause violated because the district court calculated petitioner's base offense level in part by considering activities that petitioner committed before the effective date of the Sentencing Guidelines. Sentencing Guidelines § 3B1.1(a) provides for a four-level enhancement in the defendant's offense level "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Petitioner's sentence on the tax count was enhanced under that Section based on evidence in the presentence report that petitioner was the leader of an extensive marijuana distribution network through which he netted the approximately $1 million that he failed to report as income. That enhancement was in accordance with Fifth Circuit law at the time petitioner committed the tax offense, which directed that "the section 3B1.1(a) adjustment must be anchored to the transaction leading to the conviction." *United States* v. *Mir*, 919 F.2d 940, 944 (1990). Thus, the "transaction" was not seen as limited to the "minimal elements necessary for conviction," but instead was defined by the "contours of the underlying scheme itself." *Id.* at 945. Accordingly, "[a]ll participation firmly based in that underlying transaction [was] ripe for consideration." *Ibid.* A November 1, 1990, amendment to the introductory commentary to Sentencing Guidelines § 3B1.1 confirmed that interpretation by making clear that "[t]he determination of the defendant's role in the offense is to be made on the basis of all the conduct within the scope of § 1B1.3 (Relevant Conduct), * * * and not solely on the basis of elements and acts cited in the count of conviction."[5]

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[5] The courts of appeals initially were divided over whether the sentencing court could consider only the offense of conviction, see *United States* v. *Pettit*, 903 F.2d 1336, 1340-1341 (10th Cir.), cert.

Thus, under the Sentencing Guidelines, petitioner was punished only for his offense of conviction. His status as a leader of the marijuana conspiracy, which was considered under Sentencing Guidelines § 3B1.1(a) as relevant conduct, was simply one factor bearing on the appropriate punishment for his offense of conviction. See, *e.g.*, *United States* v. *Haddock*, 956 F.2d 1534, 1554 (10th Cir.), cert. denied, 113 S. Ct. 88 (1992); *United States* v. *Ykema*, 887 F.2d 697, 770 (6th Cir. 1989), cert. denied, 493 U.S. 1062 (1990). The practice of considering a defendant's other offenses when sentencing him for the offense of conviction is a longstanding feature of sentencing law, see, *e.g.*, *Williams* v. *New York*, 337 U.S. 241 (1949), and the adoption of that principle under the Sentencing Guidelines simply codifies prior law. As the Sixth Circuit explained in *United States* v. *Ykema*, "[o]mitting all reference in sentencing to information that occurred before the effective date of the guidelines would cripple the use of the guidelines to bring conformity to punishment for like criminal conduct." 887 F.2d at 700.

As applied to petitioner, the enhancement provision of Sentencing Guidelines § 3B1.1(a) serves a function similar to that of an habitual criminal statute. *United States* v. *Regan*, 989 F.2d 44, 48 (1st Cir. 1993); *United States* v.

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denied, 498 U.S. 873 (1990); *United States* v. *Williams*, 891 F.2d 921, 925 (D.C. Cir. 1989), or whether the court also could consider conduct that is part of the same course of conduct or common scheme or plan, see *United States* v. *Fells*, 920 F.2d 1179 (4th Cir. 1990), cert. denied, 111 S. Ct. 2831 (1991); *United States* v. *Mir*, 919 F.2d at 945. Since that amendment was adopted, the courts of appeals have agreed that sentencing courts must use the relevant conduct Guideline, Sentencing Guidelines § 1B1.3, in assessing the defendant's role in the offense under Part B of Chapter 3 of the Guidelines. See, *e.g.*, *United States* v. *Lillard*, 929 F.2d 500 (9th Cir. 1991); *United States* v. *Perdomo*, 927 F.2d 111 (2d Cir. 1991); *United States* v. *Rodriguez*, 925 F.2d 107 (5th Cir. 1991); *United States* v. *Murillo*, 933 F.2d 195, 200 (3d Cir. 1991).

Ykema, 887 F.2d at 700; *United States* v. *Allen*, 886 F.2d at 146. In *Gryger* v. *Burke*, 334 U.S. 728 (1948), this Court held that an habitual criminal statute could be applied to a defendant without violating the Ex Post Facto Clause even though the defendant had committed one of his prior offenses before the recidivist statute became law. This Court explained that "[t]he sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." 334 U.S. at 732. The Court's reasoning in *Gryger* is equally applicable to this case.[6]

2. Petitioner argues that the standard applied by the court of appeals for reviewing the district court's acceptance of responsibility determination is at odds with the "clearly erroneous" standard of review applied by other circuits. Pet. 16-19. The court of appeals held that the district court's determination as to the defendant's entitlement to an acceptance of responsibility reduction will be upheld unless the defendant shows it to be "without foundation." Pet. App. A13. The standard applied by the court in this case is consistent with the Sentencing Guidelines admonition that because "[t]he sentencing judge is in a unique position to evaluate a defendant's ac-

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[6] The circuits that have addressed the question have uniformly held that a sentencing court does not violate the Ex Post Facto Clause by considering offenses committed by a defendant before the Sentencing Guidelines went into effect when calculating a defendant's sentence under the Guidelines. See *United States* v. *Regan*, 989 F.2d at 48; *United States* v. *Haddock*, 956 F.2d at 1553; *United States* v. *Cusack*, 901 F.2d 29, 32 (4th Cir. 1990); *United States* v. *Terzado-Madruga*, 897 F.2d 1099, 1124 (11th Cir. 1990); *United States* v. *Sheffer*, 896 F.2d 842, 844-845 (4th Cir.), cert. denied, 498 U.S. 838 (1990); *United States* v. *Ykema*, 887 F.2d at 700; *United States* v. *Allen*, 886 F.2d 143, 145-146 (8th Cir. 1989).

ceptance of responsibility" its determination in this regard is "entitled to great deference on review." Sentencing Guidelines § 3E1.1, Application Note 5. Any difference between the "clearly erroneous" test and the "without foundation" standard applied by the court below is unlikely to result in a difference in outcome in many cases, if it affects any at all. Certainly the outcome of this case would not be affected by a difference in the language used to describe the standard of review, as the district court's ruling on the acceptance-of-responsibility issue was firmly based in the record.

3. Petitioner maintains that the application of Sentencing Guidelines § 3E1.1 in this case violated his Fifth Amendment privilege against compulsory self-incrimination by punishing him for refusing to discuss any circumstances not related to his offenses of conviction. Pet. 20-25. On appeal, petitioner argued that he was entitled to an acceptance-of-responsibility reduction under Section 3E1.1 because he had pleaded guilty to all counts against him. He did not claim, however, that the district court's failure to award him a reduction violated his Fifth Amendment self-incrimination privilege. Thus, he cannot raise that claim now. *United States* v. *Lovasco*, 431 U.S. at 788 n.7. In any event, petitioner's claim does not warrant further review.

Petitioner is correct that at one time there was some disagreement among the courts of appeals with respect to whether Sentencing Guidelines § 3E1.1, in requiring a defendant to accept responsibility for conduct other than what underlies the offense of conviction, implicates the Fifth Amendment. Compare, *e.g.*, *United States* v. *Mourning*, 914 F.2d 699 (5th Cir. 1990), with *United States* v. *Oliveras*, 905 F.2d 623, 626-628 (2d Cir. 1990), and *United States* v. *Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989). The Sentencing Commission, however, has now resolved that disagreement. An amendment to the

Sentencing Guidelines that became effective on November 1, 1992, changes the language in Sentencing Guidelines § 3E1.1 to require a defendant to accept responsibility for "his offense." Application Note 1(a) to Section 3E1.1 also indicates that that Guideline requires a showing of contrition only with respect to the offense of conviction. The disagreement cited by petitioner thus is only a matter of historical interest; it is of no continuing practical importance.

Nor did it implicate the Fifth Amendment for the district court to deny petitioner an acceptance-of-responsibility reduction for refusing to answer questions about conduct unrelated to the specific offenses to which he pleaded guilty. Other conduct on petitioner's part amply supports the district court's conclusion that petitioner did not show genuine remorse for his crime, and that he was accordingly not entitled to an acceptance-of-responsibility reduction in his offense level.

Petitioner was evasive and refused to cooperate with probation officials after entry of his guilty plea, declining to provide any information regarding his culpability. He stated that he could not add any details to those already found in the government's report, claiming that any attempt on his part to explain his version of the case would be useless since he had already pleaded guilty. What is more, he maintained that his income was earned from legitimate sources, such as the sale of tractor trailers and farm equipment, which he said he reported on his taxes. Pet. App. A14-A15; PSI 14. Petitioner's refusal to answer questions that were directly related to his offenses of conviction justified the district court in finding that petitioner had failed to carry his burden of demonstrating an affirmative acceptance of responsibility.

For that reason, the district court's refusal to reduce petitioner's offense level under Section 3E1.1 rested on

several factors apart from petitioner's refusal to discuss his participation in the marijuana conspiracy and the double homicide. A sentencing court's reliance on conduct that is inconsistent with the acceptance of responsibility has been uniformly upheld. See, *e.g.*, *United States* v. *Olvera*, 954 F.2d 788, 793 (2d Cir.), cert. denied, 112 S. Ct. 3011 (1992); *United States* v. *Reed*, 951 F.2d 97, 99-100 (6th Cir. 1991), cert. denied, 112 S. Ct. 1700 (1992); *United States* v. *O'Neil*, 936 F.2d 599, 600-601 (1st Cir. 1991); *United States* v. *Villarino*, 930 F.2d 1527, 1529-1530 (11th Cir. 1991); *United States* v. *Hibbert*, 929 F.2d 434, 435 (8th Cir. 1991); *United States* v. *Cooper*, 912 F.2d 344, 346-348 (9th Cir. 1990); *United States* v. *Franklin*, 902 F.2d 501, 506 (7th Cir.), cert. denied, 498 U.S. 906 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1993